

May 10, 2007

Mr. Thomas V. McCoy
P.O. Box 265
Bethel, DE 19931

**RE: Freedom of Information Act Complaints
Against Town of Bethel**

Dear Mr. McCoy:

By letters dated February 14, 19, and 27 and March 13, 2007, you filed complaints with our Office alleging that the Town of Bethel ("the Town") violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA"). Specifically, you allege that: (1) the agenda for the Town's September 5, 2006 meeting did not adequately notify the public that the Town would discuss discontinuing its Comprehensive Plan and disbanding the Planning Commission; (2) the Town decided to re-schedule its November 7, 2006 meeting until November 9, 2006 without meeting in public; (3) the agenda for the November 9, 2006 meeting did not notify the public that the Town would consider a subdivision application by Lawrence Steele, III; (4) the Town re-noticed its January 2, 2007 meeting to January 9, 2007 without prior notice to the public; (6) a quorum of the Town Council met privately without notice to the public on February 12, 2007 to discuss a matter of public business (voter eligibility for the upcoming Town election on February 24, 2007); (7) the Town did not give timely notice to the public of a "special emergency" meeting held on February 14, 2007; (8) the Town did not honor your request to be placed on the agenda for the March 6, 2007

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meeting to discuss the application of Robert's Rules of Order; and (9) on several occasions the Town did not post notices for its meetings at its principal place of business or the place where the Town regularly holds its meetings.

By letter dated February 20, 2007, our Office asked the Town to respond to your FOIA complaints in writing by March 5, 2007. Because the Town had retained a new Town attorney, our Office granted his request for a brief extension of time to respond to your complaints by March 12, 2007. We received the Town's initial response to your complaints on March 12, 2007. We asked the Town for additional information which we received on March 26, 2007. On April 4 and 9, 2007 our Office asked the Town for additional information which we received by April 10, 2007.

RELEVANT STATUTES

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed" for executive session as authorized by statute. 29 *Del. C.* §10004(a).

FOIA requires public bodies to "give the public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least seven days in advance thereof. The notice shall include the agenda," *Id.* §10004(e)(1).

FOIA defines an "agenda" as "a general statement of the major issues to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor" *Id.* §10002(a).

FOIA authorizes a public body to hold a special meeting with less than seven days' public

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notice but "no later than 24 hours before such meeting." 29 *Del. C.* §10004(d)(3). "The public notice of a special . . . meeting shall include an explanation as to why [the normal seven days' notice] could not be given." *Id.* §10004(d)(3).

FOIA requires a public body to post notices and agendas of meetings "at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held," *Id.* §10004(e)(4).

LEGAL ANALYSIS

1. September 5, 2006 Meeting

The agenda for the Town's September 5, 2006 meeting listed for discussion, "Comprehensive Plan Discussion – (Jeff Hastings, Bill Rutledge)." You contend that this agenda did not adequately inform the public that the Town would discuss disbanding the Planning Commission "since they saw no need for a Comprehensive Plan."

The minutes of the September 5, 2006 meeting reflect that Councilman Rutledge intended to make "a motion to discontinue the comprehensive plan and disband the planning commission because the Town did not have a lot of money to pay for the plan." According to the minutes, after talking with the Town's attorney, Mr. Rutledge decided "not to do this" and the Council decided that this discussion "could wait."

"‘An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their concerns or ideas.’" *Att’y Gen. Op.* 05-IB11 (Apr. 11, 2005)

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(quoting *Att'y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att'y Gen. Op.* 97-IB20 (Oct. 20, 1997))).

Our Office does not believe that the agenda item – "Comprehensive Plan" – for the Town's September 5, 2006 meeting sufficiently alerted the public that the Town might discontinue the Comprehensive Plan and disband the Planning Commission. Because the Town decided not to discuss those issues but rather deferred them until a future meeting, we do not believe that any remediation is required for this FOIA violation. See *Att'y Gen. Op.* 05-IB11 (Apr. 11, 2005) ("the Council took the appropriate step to defer any discussion on the merits until the matter could be noticed to the public").

2. November 9, 2006 Meeting

You allege that: (a) the Town re-scheduled a meeting from November 7 to November 9, 2007 without prior discussion or vote at the Town's October 2006 meeting; (b) the reason stated for the re-scheduling (November 7, 2007 was a legal holiday (election day)) was inadequate because the Town re-scheduled the meeting for another legal holiday (Return Day); (c) "The agenda was not posted at the Town's principal place of business, the Bethel Community House"; and (d) the agenda did not adequately inform the public that "a subdivision application was scheduled for a property [owned by Lawrence Steele, III]."

The first two issues you raise are not FOIA issues. FOIA does not require a public body to meet in public to re-schedule a meeting. FOIA only requires timely notice of the date and time of the re-scheduled meeting, and you do not allege that the Town did not post timely notice of the November 9, 2006 re-scheduled meeting. FOIA also does not require a public body to have a particular reason to re-scheduled a meeting so long as the public has timely notice of the re-

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scheduled meeting.

FOIA requires a public body to post the notice and agenda for a meeting "at the principal place of business of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held, . . ." 29 *Del. C.* §10004(e)(4). According to the Town, "the Town Council has not had a fixed office until recently, when it purchased the old Bethel M.P. Church." FOIA, therefore, required the Town to post notices of its meetings at the place where its meetings are regularly held.

The Town acknowledges that it has not posted "meeting notices at the Bethel Community House, which is where the Town of Bethel currently holds its public meetings. It has been the practice of the Bethel Town Council to post its meeting notices on a weatherproof notice board at the Bethel Post office, which is located a short distance from the Community House. Notices are also posted inside the Post Office, and at the Bethel Market."

The Town acknowledges that "this practice does not comply" with FOIA. By letter dated March 12, 2007, the Town represented that the "Council will change its practice and post its meeting notices at the Bethel Community Center from now on."

Our Office commends the Town for posting notices of meetings in as many places as possible to keep the public informed, but the mandate of FOIA is clear. Publication "shall include, but not be limited to, conspicuous posting of said notice at the principal office of the public body holding the meeting," 29 *Del. C.* §10004(e)(4).

Our Office determines that the Town violated the open meeting requirements of FOIA by not

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posting notice of its November 9, 2006 meeting at the place where the Council regularly held its meetings, the Bethel Community Center. We do not believe that any remediation is necessary for this violation for two reasons. First, there is no evidence in the record that any citizens were deprived of the opportunity to attend the November 9, 2006 meeting because the Town did not post notice at the Community Center. Second, the Town has committed to "change its practice and post its meeting notices at the Bethel Community Center from now on."

You also allege that the agenda for the Town's November 9, 2006 meeting did not inform the public that the Council would consider a subdivision application by Mr. Steele. The agenda for the November 9, 2006 meeting listed for discussion, "Public Hearing for consideration of the application of T. Henley Graves and Lawrence B. Steele III to rescind a previously approved site plan for a 5 lot subdivision of Tull/Remy and to approve a 3 lot subdivision of the same lands pursuant to surveys submitted by the applicants."

The record does not support your claim that the Town did not notice the Steele subdivision application in the agenda for the November 9, 2006 meeting.

3. December 5, 2006 Meeting

You allege that: (a) the agenda for the Town's December 6, 2006 meeting "was not posted at the Town's principal place of business, the Bethel Community House"; and (b) "There was no vote or agenda item on rescheduling the January meeting at the December 2006 meeting."

In Section 2. above, we addressed the place of posting issue and do not re-visit it here.

The agenda for the Town's December 5, 2006 meeting listed for discussion, "Vote to ratify continuance of the following public hearing until Jan. 9th 2007. Public hearing pursuant to section 813(b) of the Bethel Town Code for removal of Mary McCoy from the Planning Commission for cause." The minutes of the December 5, 2006 meeting reflect that the Town Council voted to continue the public hearing originally scheduled for January 2, 2007 until January 9, 2007.

The record does not support your allegation that there "was no vote or agenda item" about re-scheduling the January 2, 2007 meeting to January 9, 2007.

4. January 9, 2007 Meeting

You allege that: (a) the Town posted the notice and agenda for its January 9, 2007 meeting on January 4, 2007, not seven days in advance as required by FOIA; and (b) the "agenda was not posted at the Town's principal place of business, the Bethel Community House."

In Section 2. above, we addressed the place of posting issue and do not re-visit it here.

According to the Town, the Town Secretary (William Rutledge) believes that he posted the notice and agenda for the January 9, 2007 meeting at least seven days in advance but does not recall the exact date. Mr. Mark Shaver, the current Secretary, however, recalls that the notice and agenda were posted on January 2, 2007. "He can confirm this because, at the time, the practice was to post the agenda/notice of Town Meeting at the United States Post Office in and at the Bethel Market. Mr. Shaver is the owner of the Bethel Market, and specifically recalls the agenda/notice of Town meeting was posted on time."

Based on this record, our Office determines that the Town posted timely public notice under FOIA of its January 9, 2007 meeting.

5. February 6, 2007 Meeting

You allege that the notice and agenda for this meeting "was not posted at the Town's principal place of business, the Bethel Community House. In Section B. above, we addressed the place of posting issue and do not re-visit it here.

6. February 12, 2007 Meeting

You allege that "On Monday, February 12, 2007, Mark Shaver, a member of the Town Council of the Town of Bethel, contacted by phone at least two, possibly more, residents of the Town of Bethel. Mr. Shaver's stated purpose was to set up a meeting to discuss voter eligibility for the upcoming town election, scheduled for February 24, 2007."

According to the Town, Councilman Shaver telephoned Jack Chadwick (who is not a member of the Council) because he "had been concerned about the election rules and voter eligibility and had made several requests for clarification of same in the last three months. Mr. Shaver's call was for the purpose of getting Mr. Chadwick's thoughts on gathering a few volunteers to meet with the newly appointed election committee and produce a list of eligible voters in the upcoming town election."

According to the Town, Councilman Shaver then tried to contact Mr. George Anderson (who is not a member of the Council) to see if he would like to be involved, but could not reach Mr. Anderson. According to the Town, Councilman Shaver then talked again with Mr. Chadwick who "no longer thought that it was a good idea to proceed as had been discussed earlier, and suggested that the lawyers should make any decisions about how to handle the election. Later in the day, Mr. Anderson returned Mr. Shaver's phone call to let him know that he did not think it was appropriate

for the meeting to occur either."

"In several opinions our Office determined that a public body might achieve a 'constructive quorum' through serial meetings of less-than-a-quorum of the public body." *Att'y Gen. Op.* 07-ID[] (Mar. 13, 2007) (citations omitted). "'All of our previous opinions which found serial discussions to have violated FOIA had one factor in common. In each case the discussions involved enough members of the public body that would have constituted a quorum had the discussions all occurred at the same time and place.'" *Id.* (quoting *Att'y Gen. Op.* 06-ID18 (Sept. 5, 2006)).

The serial telephone conversations between Councilman Shaver and Messrs. Chadwick and Anderson did not amount to a "constructive quorum" of the Town Council because they involved only one member of the Council and not a quorum of the Council. Our Office determines that a quorum of the Council did not meet privately on February 12, 2007 without notice to the public in violation of FOIA.

7. February 14, 2007 Meeting

You allege that the Town gave only two days' notice to the public of a "special emergency" meeting held on February 14, 2007 meeting. Our Office received another FOIA complaint about this issue (before yours) from Ms. Patricia Kough and we will provide you with a copy of our written determination in response to Ms. Kough's complaint.

8. March 6, 2007 Meeting

According to your complaint, you asked the Town "that I be placed on the March 6, 2007, Town Council meeting agenda so that I could speak about Robert's Rules of Order. . . . This matter,

which I believe is a matter of public concern was omitted from the agenda for that evening."

"FOIA enables citizens to have notice and attend meetings of public bodies to watch the discussion of public business, but does not afford the public any right to participate in the meetings." *Att'y Gen. Op.* 03-IB06 (rev. Feb. 11, 2003). FOIA, therefore, did not require the Town to put you on the agenda for the March 5, 2007 meeting at your request. "[T]he plain language of FOIA does not require public participation, only that citizens have timely notice of public meetings so that they can monitor and observe their elected officials discuss matters of public concern." *Id.* ¹

9. March 13, 2007 Meeting

You allege that the Town did not post the notice and agenda for its March 13, 2006 meeting at the Bethel Community House where the Town holds its meetings.

By letter dated March 12, 2007, the Town represented that it would change its practice of posting notices of Council meetings to include the Bethel Community House. According to the Town, the "new posting procedure was effective on March 26, 2007, which was the date the agenda/meeting notice for the April 3, 2007 Town meeting was posted on the Bethel Community Center."

Our Office is satisfied that the Town has followed through on its commitment to comply with FOIA and post notices of Council meetings (in addition to other public places) at the place where the Council regularly holds its meetings (the Bethel Community Center). We do not believe that any

¹ "If a public body chooses to allow public participation in a meeting, however, then it must treat members of the public fairly and even-handedly. Once a forum is open to the public for the expression of views the government may not pick and choose between those views which may or may not be expressed." *Att'y Gen. Op.* 03-IB06. The agenda for the Town's March 6, 2007 meeting did not provide for a period of public comment.

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remediation is necessary for the Town's failure to post notice of the March 13, 2007 meeting at the Community Center because there is no evidence in the record to suggest that citizens were unable to attend that meeting because they did not have notice through other sources.

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CONCLUSION

For the foregoing reasons, our Office determines that the Town violated FOIA by not posting the notices and agendas for its meetings held on November 9 and December 5, 2007 and on January 9, February 6 and March 13, 2007 at the place where the Town's meetings are regularly held, the Bethel Community Center.

Our Office does not believe that remediation is necessary for these place-of-posting violations because: (1) the record shows that the Town posted notice of its meetings in various public places, including the Bethel Post Office and Bethel Market; (2) there is no evidence in the record that citizens were unable to attend those meetings because they did not have notice; and (3) the Town has committed to posting notice of its meetings at the Bethel Community Center from now on.

Our Office determines that the Town violated FOIA by not adequately informing the public in the agenda for its September 5, 2006 meeting that the Town would discuss discontinuing the Comprehensive Plan and disbanding the Planning Commission. We do not believe that any remediation is required for this violation because at the meeting the Town did not to discuss those matters of public business on the merits but rather deferred discussion until a future meeting.

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Our Office determines that the remainder of your alleged FOIA violations by the Town are not supported by the record.

Very truly yours,

W. Michael Tupman, Esquire
Deputy Attorney General

APPROVED

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State Solicitor

cc: The Honorable Joseph R. Biden, III
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